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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Craig Ataide and Lauri Ataide; Tracy A. Aubuchon and Tim Gross; James Brace, Individually and as Successor-In-Interest on behalf of the Estate of Janice Brace; Sue Briggs and Randolph Martin; William F. Delaney; Jaime Donato, Individually and as Successor-In-Interest on behalf of the Estate of Richard Quinn; Donna Hoyt, Individually and as Successor-In-Interest on behalf of the Estate of John Hoyt; Douglas Knapp and Nellie Ban Dan; Dominic Mammola; Roberto Martell and Maria J. Martell; Arthur Martinez; Jeffrey Nielsen and Juliana Nielsen; Arthur Presser; Willie San Nicolas; Sunny Siguenza; Jeffrey Thurlow; Abel Valli, Jr. and Marie Valli; Carey Watson; Linton John Dise; Richard Jones and Barbara Jones; Cynthia Gannon; Shirley Williams, Individually and as Successor-In-Interest on behalf of the Estate of Thomas Williams; Roberta Lilla; William Tinkey and Doreen Frost; Edward Magennis; James Winchester and Edith Winchester; and Gary Merin,

Plaintiffs,

v.

Monsanto Company, Wilbur-Ellis Company LLC, and Wilbur-Ellis Feed, LLC,

Defendants.

Case No. 3:19-cv-01289

MONSANTO COMPANY'S NOTICE OF REMOVAL

1 By filing this Notice of Removal and related papers, defendant Monsanto Company
2 (“Monsanto”) hereby removes this lawsuit to this Court pursuant to 28 U.S.C. §§ 1332, 1441, and
3 1446 (and any other applicable laws).

4 **INTRODUCTION**

5 1. The California state court lawsuit at issue here is a multi-plaintiff case that seeks
6 damages for personal injuries – non-Hodgkin’s lymphoma (“NHL”) – allegedly caused by
7 plaintiffs’ (or decedents’) exposure to Monsanto’s Roundup®-branded herbicides, which have
8 glyphosate as their active ingredient. Multidistrict litigation proceedings involving numerous
9 other Roundup® lawsuits are pending in this Court. *In re Roundup Prod. Liab. Litig.*, Case No.
10 16-md-02741-VC.

11 2. Each plaintiff is of diverse citizenship from Monsanto. But plaintiffs, who are
12 California citizens, tried to prevent Monsanto from removing this lawsuit by filing a multi-
13 plaintiff Complaint that: (a) makes bare-bone allegations about each plaintiff without providing
14 any details about the type of Roundup®-branded herbicide products allegedly used by each
15 plaintiff; and (b) in an attempt to defeat complete diversity and the right to remove, asserts claims
16 against two in-forum California companies, Wilbur-Ellis Company LLC (“Wilbur-Ellis
17 Company”) and Wilbur-Ellis Feed, LLC (“Wilbur-Ellis Feed”), that plaintiffs allege – upon mere
18 information and belief – distributed the Roundup®-branded herbicides.

19 3. However, this removal-prevention strategy was foiled by important developments
20 – California state court orders that require severance of this multi-plaintiff lawsuit and add this
21 lawsuit to the Judicial Council Coordinated Proceeding known as *Roundup Products Cases*,
22 JCCP No. 4953, as well as information provided by plaintiffs in discovery establishing the
23 absence of a viable claim against a California defendant.

24 4. As discussed in more detail below, removal is appropriate here. **First**, this Court
25 should implement the state court’s severance order and consider each main plaintiff separately
26 when analyzing whether the Court has subject matter jurisdiction. **Second**, this Court should hold
27 that it has subject matter jurisdiction and that removal is proper with respect to the cases of nine
28 main plaintiffs (and four loss-of-consortium plaintiffs) based on complete diversity of citizenship

1 because those plaintiffs fraudulently joined Wilbur-Ellis Feed and Wilbur-Ellis Company, which
 2 means that the presence of those in-forum defendants must be disregarded when the Court
 3 evaluates the issue of diversity jurisdiction and the propriety of removal notwithstanding the
 4 presence of two California defendants.

5 **BACKGROUND AND PROCEDURAL HISTORY**

6 5. Numerous unrelated plaintiffs (27 main plaintiffs and 10 loss-of-consortium
 7 plaintiffs) commenced this lawsuit in the Superior Court of the State of California for San
 8 Francisco County by filing a Complaint, captioned *Ataide, et al. v. Monsanto Company, et al.*,
 9 Case No. CGC-18-571282, on November 13, 2018 (the “State Court Action”). Copies of “all
 10 process, pleadings, and orders served upon [Monsanto],” 28 U.S.C. § 1446(a), in the State Court
 11 Action are attached collectively as Exhibit 1.

12 6. Plaintiffs sued Monsanto, Wilbur-Ellis Company and Wilbur-Ellis Feed.
 13 Although Wilbur-Ellis Feed recently changed its name to Wilbur-Ellis Nutrition, LLC,
 14 Declaration of George Arkoosh ¶ 3 (“Arkoosh Declaration”) (attached as Exhibit 2), this Notice
 15 of Removal refers to that defendant as Wilbur-Ellis Feed because that is the name used in the
 16 Complaint.

17 7. The Complaint asserts various product liability claims against all three defendants
 18 (strict liability, negligence) and seeks damages for NHL allegedly caused by Monsanto’s
 19 Roundup®-branded herbicides, which plaintiffs claim were distributed by Wilbur-Ellis Company
 20 and Wilbur-Ellis Feed. The Complaint asserts other claims only against Monsanto (fraud, breach
 21 of express and implied warranties).

22 8. The Complaint lumps Wilbur-Ellis Company and Wilbur-Ellis Feed together and
 23 refers to them collectively as “Wilbur-Ellis.” Complaint ¶¶ 51-52. The Complaint alleges that
 24 “Wilbur-Ellis is a main distributor of Roundup®, and, *upon information and belief*, distributed
 25 Roundup® used by Plaintiffs.” *Id.* ¶ 52 (emphasis added); *see also id.* ¶ 129 (“*On information*
 26 *and belief*, Wilbur-Ellis was one of the distributors providing Roundup® and other glyphosate-
 27 containing products actually used by the Plaintiffs.” (emphasis added)).

28 9. The Honorable Winifred Smith is presiding over a Judicial Council Coordinated

1 Proceeding – *Roundup Products Cases*, JCCP No. 4953 – in the Superior Court of the State of
 2 California for Alameda County.

3 10. On January 25, 2019, Judge Smith issued an order that required, *inter alia*,
 4 severance of previously filed multi-plaintiff complaints. January 25, 2019 Order (hereinafter,
 5 “JCCP Severance Order”) (attached as Exhibit 3). Judge Smith ordered, “for previously filed
 6 complaints with more than one plaintiff, that by the earlier of (1) 6/30/19 or (2) 30 days after the
 7 date the case is assigned for trial, that all plaintiffs except one per case must be dismissed and the
 8 other plaintiffs must file their own individual complaint as in paragraph 1.” *Id.* ¶ 2. The only
 9 exception to the single-plaintiff-complaint requirement is “where the facts of the plaintiffs are
 10 closely intertwined.” *Id.* ¶ 1.

11 11. On February 7, 2019, the State Court Action was added to JCCP No. 4953 for
 12 coordinated proceedings with other lawsuits involving personal injuries allegedly caused by
 13 Roundup®-branded herbicides. February 7, 2019 Order (attached as Exhibit 4). Thus, as of that
 14 date, the State Court Action became subject to the JCCP Severance Order.

15 **BASIS FOR REMOVAL – DIVERSITY JURISDICTION**

16 **I. Substantive Requirements For Removal Are Satisfied.**

17 **A. This Court should implement the JCCP Severance Order and consider each** 18 **main plaintiff separately.**

19 12. In light of the JCCP Severance Order that governs the State Court Action at issue
 20 here, this Court should implement Judge Smith’s ruling by severing each misjoined main
 21 plaintiff’s claims from the other misjoined main plaintiff’s claims.¹ Then the Court should
 22 consider each main plaintiff separately when deciding whether removal is appropriate here.

23 13. Federal courts – including courts presiding over multi-district litigation
 24 proceedings – repeatedly have held that courts are authorized to sever parties when deciding
 25 whether to remand removed lawsuits, based on various grounds, including fraudulent misjoinder,
 26

27 ¹ Monsanto acknowledges that a loss-of-consortium plaintiff’s derivative claims should not be
 28 severed from the main plaintiff’s claims. The Court should consider such plaintiffs’ claims
 together as one lawsuit.

procedural misjoinder, and/or Rule 21 of the Federal Rules of Civil Procedure. *See, e.g., Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359-60 (11th Cir. 1996) (affirming district court’s denial of remand motion and severance order; creating “fraudulent misjoinder” doctrine), *abrogated in part on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *Breitner v. Merck & Co.*, Civil Action No. 3:18-cv-15982 (PGS)(TJB), 2019 WL 316026 (D.N.J. Jan. 24, 2019) (applying fraudulent misjoinder doctrine to sever and remand claims of non-diverse plaintiffs and denying remand motion as to remaining plaintiffs); *Mayfield v. London Women’s Care, PLLC*, Civil Action No. 15-19-DLB, 2015 WL 3440492, at *3, *6 (E.D. Ky. May 28, 2015) (stating that “[i]t is well-settled that Rule 21 can be used to sever a dispensable, nondiverse party in order to preserve federal jurisdiction” and ordering severance based on Rule 21 without reaching fraudulent misjoinder argument); *In re Propecia (Finasteride) Prod. Liab. Litig.*, No. 12-MD-2331 (JG) (VVP), 2013 WL 3729570, at *14 (E.D.N.Y. May 17, 2013) (magistrate judge’s report and recommendation) (concluding that fraudulent misjoinder doctrine should be applied to sever certain plaintiffs and deny remand motion as to other plaintiffs; stating that “plaintiffs’ attempt to deny the defendants their right to removal in this manner [filing multi-plaintiff complaint] undermines both the purposes of permissive joinder and the benefits of consolidation in multi-district litigation”); *Joseph v. Baxter Int’l Inc.*, 614 F. Supp. 2d 868, 872-75 (N.D. Ohio 2009) (ordering severance based on Rule 21 and denying remand motion in part, without reaching fraudulent misjoinder argument); *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 502-05 (E.D. Cal. 2008) (applying *Tapscott* fraudulent misjoinder doctrine; ordering severance and remand based on Rule 21 and denying remand motion in part); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004) (stating that “the Wyeth Defendants’ statutory right of removal has been frustrated by Plaintiffs’ improper joinder”; ordering severance and denying remand motion for certain plaintiffs); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003) (holding that plaintiffs were fraudulently misjoined; ordering severance and denying remand motions); *In re Baycol Prods. Litig.*, MDL No. 1431 (MJD), 2003 WL 22341303, at *3 (D. Minn. 2003) (holding that claims of non-diverse plaintiff were fraudulently misjoined (or misjoined) with other plaintiffs’ claims;

1 ordering severance and remand and denying remand motions for certain plaintiffs); *In re Rezulin*
2 *Prod. Liab. Litig.*, 168 F. Supp. 2d 136, 144-48 (S.D.N.Y. 2001) (holding that plaintiffs were
3 misjoined and ordering severance of certain plaintiffs to preserve defendant's right to remove rest
4 of multi-plaintiff lawsuit).

5 14. Here, this Court need not make a fraudulent misjoinder ruling because Judge
6 Smith has already decided that, in JCCP No. 4953, multi-plaintiff complaints must be severed
7 into separate, single-plaintiff complaints. Monsanto merely asks this Court to put Judge Smith's
8 severance ruling into effect – and then decide separately for each misjoined main plaintiff
9 whether the Court has federal diversity jurisdiction over that plaintiff's claims.

10 15. Although the JCCP Severance Order set a deadline in the future when multi-
11 plaintiff complaints must be severed and refiled as single-plaintiff complaints, that should not
12 deter this Court from implementing the severance ruling when deciding whether this removal is
13 proper. The State Court Action became subject to the JCCP Severance Order when the State
14 Court Action was added to JCCP No. 4953 on February 7, 2019. If Monsanto were to wait on
15 removal until this multi-plaintiff Complaint is severed and refiled as single-plaintiff complaints,
16 those removals would occur more than thirty days after the State Court Action became subject to
17 the JCCP Severance Order, thereby presenting the issue of whether those removals were timely
18 under the thirty-day provision in 28 U.S.C. § 1446(b)(3). Monsanto should not be put to the
19 Hobson's choice of having to wait for plaintiffs to comply with the JCCP Severance Order before
20 filing removal notices – and risk losing the important statutory right of removal on timeliness
21 grounds – versus filing the removal notice now but not being able to invoke the JCCP Severance
22 Order. This Court has the authority to implement the JCCP Severance Order under Rule 21 and
23 the case law cited above, so it is appropriate, in these circumstances, for the Court to do so
24 following removal.

25 **B. This Court has diversity jurisdiction over, and removal is proper for, the cases of**
26 **nine main plaintiffs (and four loss-of-consortium plaintiffs) because they**
fraudulently joined the California defendants.

27 16. Although complete diversity of citizenship usually is required for a federal court to
28 have diversity jurisdiction, “one exception to the requirement of complete diversity is where a

1 non-diverse defendant has been ‘fraudulently joined.’” *Morris v. Princess Cruises, Inc.*, 236 F.3d
2 1061, 1067 (9th Cir. 2001). When fraudulent joinder applies – *i.e.*, when “the plaintiff fails to
3 state a cause of action against a resident defendant, and the failure is obvious according to the
4 settled rules of the state,” *id.* (quotation marks omitted) – the fraudulently joined defendant’s
5 “presence in the lawsuit is ignored” for purposes of determining whether the court has jurisdiction
6 based on diversity of citizenship, *id.* Moreover, “[f]raudulent joinder claims may be resolved by
7 ‘piercing the pleadings’ and considering summary judgment-type evidence such as affidavits and
8 deposition testimony.” *Id.* at 1068 (quoting *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d
9 256, 263 (5th Cir. 1995)); *see McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.
10 1987) (“The defendant seeking removal to the federal court is entitled to present the facts
11 showing the joinder to be fraudulent.”). Fraudulent joinder also renders the so-called “forum
12 defendant rule” inapplicable because that statutory provision applies only to “properly joined”
13 defendants. 28 U.S.C. § 1441(b)(2).

14 17. In this case, plaintiffs sued Wilbur-Ellis Company and Wilbur-Ellis Feed in the
15 hope that adding claims against those California companies would prevent removal due to lack of
16 diversity jurisdiction and/or due to the forum defendant rule. However, as discussed below, those
17 two defendants have been fraudulently joined.

18 18. Monsanto is, and was at the time the State Court Action was filed, a corporation
19 organized under the laws of the State of Delaware with its principal place of business in the State
20 of Missouri. Complaint ¶ 50. Accordingly, Monsanto is deemed to be a citizen of Delaware and
21 Missouri for purposes of federal diversity jurisdiction.

22 19. Wilbur-Ellis Company is, and was at the time the State Court Action was filed, a
23 limited liability company whose sole member is (and was at the time this lawsuit was filed)
24 Wilbur-Ellis Holdings II, Inc. *See* Declaration of Scott Hushbeck ¶ 4 (“Hushbeck Declaration”)
25 (attached as Exhibit 5).

26 20. Wilbur-Ellis Feed is, and was at the time the State Court Action was filed, a
27 limited liability company whose sole member is (and was at the time this lawsuit was filed)
28 Wilbur-Ellis Holdings II, Inc. *See* Arkoosh Declaration ¶ 5.

21. Wilbur-Ellis Holdings II, Inc. is, and was at the time the State Court Action was filed, a corporation organized under the laws of the State of Delaware with its principal place of business in the State of California. *See id.* ¶ 6; Hushbeck Decl. ¶ 5. Accordingly, Wilbur-Ellis Holdings II, Inc. is deemed to be a citizen of Delaware and California for purposes of federal diversity jurisdiction.

22. Wilbur-Ellis Company and Wilbur-Ellis Feed both are deemed to be citizens of the same states as their member Wilbur-Ellis Holdings II, Inc. – Delaware and California – for purposes of federal diversity jurisdiction.

23. The 13 plaintiffs as to whom Monsanto submits that federal jurisdiction exists (the “Removed Plaintiffs”) are citizens of California. Plaintiffs Craig Ataide and Lauri Ataide are, and were at the time the State Court Action was filed, citizens of the State of California. Complaint ¶ 13. Plaintiff Donna Hoyt is, and was at the time the State Court Action was filed, a citizen of the State of California. *Id.* ¶ 19. Plaintiffs Richard Jones and Barbara Jones are, and were at the time the State Court Action was filed, citizens of the State of California. *Id.* ¶ 32. Plaintiff Dominic Mammola is, and was at the time the State Court Action was filed, a citizen of the State of California. *Id.* ¶ 21. Plaintiff Arthur Martinez is, and was at the time the State Court Action was filed, a citizen of the State of California. *Id.* ¶ 23. Plaintiff Arthur Presser is, and was at the time the State Court Action was filed, a citizen of the State of California. *Id.* ¶ 25. Plaintiffs Abel Valli, Jr. and Marie Valli are, and were at the time the State Court Action was filed, citizens of the State of California. *Id.* ¶ 29. Plaintiff Shirley Williams is, and was at the time the State Court Action was filed, a citizen of the State of California. *Id.* ¶ 34. Plaintiffs James Winchester and Edith Winchester are, and were at the time the State Court Action was filed, citizens of the State of California. *Id.* ¶ 38.

24. Therefore, disregarding Wilbur-Ellis Feed and Wilbur-Ellis Company – which were fraudulently joined by the Removed Plaintiffs – means that there is complete diversity of citizenship and that the forum defendant rule does not apply.

25. The following chart summarizes Monsanto’s fraudulent joinder arguments in support of removal, more fully set forth below, as to each individual plaintiff (and whether a

particular plaintiff should remain in federal court, or be remanded subject to a reservation of rights for a future removal if warranted under applicable law or facts based on fraudulent joinder or otherwise):

Plaintiff [loss of consortium plaintiffs shown in brackets]	State of Citizenship	Personal Roundup Use-Only?	Both Wilbur-Ellis (CA) Entities Fraudulently Joined?	Remain in Federal Court?
Craig Ataide [Lauri Ataide]	CA CA	Yes	Yes Yes	Yes Yes
Donna Hoyt	CA	Yes	Yes	Yes
Richard Jones [Barbara Jones]	CA CA	Yes	Yes Yes	Yes Yes
Dominic Mammola	CA	Yes	Yes	Yes
Arthur Martinez	CA	Yes	Yes	Yes
Arthur Presser	CA	Yes	Yes	Yes
Abel Valli, Jr. [Marie Valli]	CA CA	Yes	Yes Yes	Yes Yes
Shirley Williams	CA	Yes	Yes	Yes
James Winchester [Edith Winchester]	CA CA	Yes	Yes Yes	Yes Yes
James Brace	CA	? (No PFS)	N/A at this time	No
Sue Briggs [Randolph Martin]	CA CA	? (No PFS)	N/A at this time N/A at this time	No No
Jaime Donato	CA	? (No PFS)	N/A at this time	No
Jeffrey Thurlow	CA	? (No PFS)	N/A at this time	No
Tracy Aubuchon [Tim Gross]	CA CA	No	N/A at this time N/A at this time	No No
William Delaney	CA	No	N/A at this time	No
Linton Dise	CA	No	N/A at this time	No
Cynthia Gannon	CA	No	N/A at this time	No
Douglas Knapp [Nellie Dan]	CA CA	No	N/A at this time N/A at this time	No No
Roberta Lilla	CA	No	N/A at this time	No
Edward Magennis	CA	No	N/A at this time	No
Roberto Martell [Maria Martell]	CA CA	No	N/A at this time N/A at this time	No No
Gary Merin	CA	No	N/A at this time	No
Jeffrey Nielsen [Juliana Nielsen]	CA CA	No	N/A at this time N/A at this time	No No
Willie San Nicolas	CA	No	N/A at this time	No
Sunny Siguenza	CA	No	N/A at this time	No
William Tinkey [Doreen Frost]	CA CA	No	N/A at this time N/A at this time	No No
Carey Watson	CA	No	N/A at this time	No

1 1. The Removed Plaintiffs fraudulently joined Wilbur-Ellis Feed.

2 26. Wilbur-Ellis Feed did not come into existence as a corporate entity until
3 September 2015. Arkoosh Declaration ¶ 7. Therefore, any Removed Plaintiff (or any Removed
4 Plaintiff's decedent) whose alleged exposure to Roundup®-branded herbicides ended before that
5 date – namely, Donna Hoyt, Shirley Williams, and James Winchester, *see* Complaint ¶¶ 19, 34,
6 38 – does not have viable claims against Wilbur-Ellis Feed.

7 27. Wilbur-Ellis Feed is (and has been) in the business of ensuring that animals
8 receive customized, high-quality, dependable nutrients. Arkoosh Declaration ¶ 7. Wilbur-Ellis
9 Feed has never designed, manufactured, distributed, or sold Roundup®-branded herbicides or any
10 other herbicides. *Id.* Therefore, the Removed Plaintiffs do not have any viable claims against
11 Wilbur-Ellis Feed. *See, e.g., Martinez v. McKesson Corp.*, No. 3:15-cv-02903-H-JLB, 2016 WL
12 5930271 (S.D. Cal. Apr. 7, 2016) (holding that California defendant was fraudulently joined
13 because it did not manufacture Mirena and did not distribute *plaintiff's* Mirena); *Tucker v.*
14 *McKesson Corp.*, No. C 10–2981 SBA, 2011 WL 4345166 (N.D. Cal. Sept. 14, 2011) (holding
15 that California defendant was fraudulently joined because it did not distribute morphine tablets to
16 pharmacy where decedent obtained morphine tablets at issue in lawsuit); *Vu v. Ortho-McNeil*
17 *Pharm., Inc.*, 602 F. Supp. 2d 1151, 1154-55 (N.D. Cal. 2009) (holding that California defendant
18 was fraudulently joined because she did not market or distribute Children's Tylenol Plus Multi-
19 Symptom Cold medicine); *Aronis v. Merck & Co.*, No. Civ. S-05-0486 WBS DAD, 2005 WL
20 5518485 (E.D. Cal. May 3, 2005) (holding that California defendant was fraudulently joined
21 because plaintiff alleged merely that defendant was a major distributor of Vioxx without
22 connecting defendant to plaintiff's injuries).

23 28. For the foregoing reasons, the Court should hold that the Removed Plaintiffs
24 fraudulently joined Wilbur-Ellis Feed and should disregard the citizenship of that defendant when
25 assessing whether their claims have been properly removed.

26 2. The Removed Plaintiffs fraudulently joined Wilbur-Ellis Company.

27 29. Wilbur-Ellis Company is (and has been) in the business of, among other things,
28 distributing and selling certain pesticides and herbicides, including certain glyphosate-based

1 herbicide products. Hushbeck Declaration ¶ 6. Glyphosate-based herbicide products (including
2 Monsanto’s glyphosate-based herbicides) are designed for and sold to three different markets:
3 (a) the agricultural market; (b) the residential-lawn-and-garden market; and (c) what Wilbur-Ellis
4 Company calls the professional market, which involves herbicide products that are designed for
5 and sold to, for example, landscaping companies, golf courses, schools, or state and local
6 government agencies (to maintain roads, parks, and/or rights-of-way). *Id.*; *see* Declaration of
7 Steven Gould ¶ 5 (“Gould Declaration”) (attached as Exhibit 6). That third market is what
8 Monsanto calls the industrial, turf, and ornamental (“IT&O”) market. Hushbeck Declaration ¶ 6;
9 Gould Declaration ¶ 5.

10 30. Wilbur-Ellis Company is (and has been) in the business of distributing and selling
11 only certain categories of Monsanto glyphosate-based herbicide products – namely, herbicides
12 designed for the agricultural market and herbicides designed for the IT&O/professional market.
13 Gould Declaration ¶ 6; Hushbeck Declaration ¶ 7.

14 31. Wilbur-Ellis Company does not sell (and has never sold) Monsanto glyphosate-
15 containing herbicides that have been created and designed for the residential-lawn-and-garden
16 market. Gould Declaration ¶ 6; Hushbeck Declaration ¶ 7. For example, Wilbur-Ellis Company
17 has never played any role in the chain of distribution leading to Monsanto’s glyphosate-based,
18 lawn-and-garden herbicides being sold at national retail stores like Home Depot, Lowe’s, Target,
19 Walmart, Costco, or Ace Hardware. Hushbeck Declaration ¶ 7; *see* Gould Declaration ¶ 6.

20 32. Moreover, Wilbur-Ellis Company is not (and has never been) the sole or exclusive
21 distributor of Monsanto’s glyphosate-based herbicides in the State of California. Hushbeck
22 Declaration ¶ 8; Gould Declaration ¶ 7. There are (and have been) other distributors of
23 Monsanto’s glyphosate-based herbicides in California. Gould Declaration ¶ 7. Wilbur-Ellis
24 Company has never been the largest distributor of those herbicides in California. *Id.* ¶ 7.

25 33. Wilbur-Ellis Company has never designed or manufactured Monsanto’s
26 glyphosate-based herbicides. Hushbeck Declaration ¶ 9; Gould Declaration ¶ 8.

27 34. The Removed Plaintiffs have submitted Plaintiff’s Fact Sheets stating that they
28 used Roundup®-branded herbicides for personal use and not for work-related reasons. *See* Craig

1 Ataide's Plaintiff's Fact Sheet at 8 (excerpts attached as Exhibit 7); Donna Hoyt's Plaintiff's Fact
 2 Sheet at 8 (excerpts attached as Exhibit 8); Richard Jones' Plaintiff's Fact Sheet at 8 (excerpts
 3 attached as Exhibit 9); Dominic Mammola's Plaintiff's Fact Sheet at 8 (excerpts attached as
 4 Exhibit 10); Arthur Martinez's Plaintiff's Fact Sheet at 8 (excerpts attached as Exhibit 11); Arthur
 5 Presser's Plaintiff's Fact Sheet at 8 (excerpts attached as Exhibit 12); Abel Valli, Jr.'s Plaintiff's
 6 Fact Sheet at 8 (excerpts attached as Exhibit 13); Shirley Williams' Plaintiff's Fact Sheet at 8
 7 (excerpts attached as Exhibit 14); James Winchester's Plaintiff's Fact Sheet at 8 (excerpts
 8 attached as Exhibit 15). Thus, those plaintiffs (and their associated loss-of-consortium plaintiffs)
 9 do not have viable claims against Wilbur-Ellis Company. *See supra* Paragraph 27 (citing
 10 fraudulent joinder cases).

11 35. For the foregoing reasons, the Court should hold that the Removed Plaintiffs
 12 fraudulently joined Wilbur-Ellis Company and should disregard the citizenship of that defendant
 13 when assessing whether their claims have been properly removed.

14 * * * *

15 36. The Complaint seeks compensatory and punitive damages based on allegations
 16 that Monsanto's Roundup[®]-branded herbicides caused plaintiffs (or their decedents) to develop
 17 cancer (NHL). Therefore, it is plausible from the face of the Complaint that plaintiffs seek
 18 damages in excess of \$75,000, exclusive of interest and costs, which satisfies the jurisdictional
 19 amount-in-controversy requirement. 28 U.S.C. § 1332(a); *see Dart Cherokee Basin Operating*
 20 *Co. v. Owens*, 135 S. Ct. 547, 554 (2014) ("[A] defendant's notice of removal need include only a
 21 plausible allegation that the amount in controversy exceeds the jurisdictional threshold."); *see*
 22 *also Ross v. First Family Fin. Servs., Inc.*, No. 2:01CV218-P-B, 2002 WL 31059582, at *8 (N.D.
 23 Miss. Aug. 29, 2002) ("[U]nspecified claims for punitive damage sufficiently serve to bring the
 24 amount in controversy over the requisite jurisdictional threshold set out in 28 U.S.C. § 1332.").
 25 In fact, other lawsuits seeking damages for NHL allegedly caused by Roundup[®]-branded
 26 herbicides have been filed against Monsanto in this Court and other federal courts asserting
 27 jurisdiction under § 1332(a) and alleging damages in excess of \$75,000, exclusive of interest and
 28 costs.

37. Thus, this Court has original subject matter jurisdiction over the claims of the Removed Plaintiffs (the Ataides, Hoyt, the Joneses, Mammola, Martinez, Presser, the Vallis, Williams, and the Winchesters) based on § 1332(a) because there is complete diversity of citizenship between those plaintiffs and Monsanto (disregarding the citizenship of the fraudulently joined Wilbur-Ellis companies) and because the amount in controversy exceeds \$75,000, exclusive of interest and costs.

38. Fourteen plaintiffs – Tracy Aubuchon, William Delaney, Linton Dise, Cynthia Gannon, Douglass Knapp, Roberta Lilla, Edward Magennis, Roberto Martell, Gary Merin, Jeffrey Nielsen, Willie San Nicolas, Sunny Siguenza, William Tinkey, and Carey Watson – submitted Plaintiff’s Fact Sheets claiming something other than exclusively personal/residential use of Roundup®-branded herbicides. Four plaintiffs – James Brace, Sue Briggs, Jaime Donato, and Jeffrey Thurlow – have not submitted Plaintiff’s Fact Sheets. Accordingly, based on those plaintiffs’ upon-information-and-belief allegations in the Complaint and the evidence available to Monsanto at this time, Monsanto does not object to the Court remanding the claims of those eighteen plaintiffs and their associated loss-of-consortium plaintiffs (with Monsanto reserving the right to remove their claims later based on subsequent developments and applicable legal principles).

39. To summarize, the status of the plaintiffs named in the Complaint is as follows:

- Craig and Lauri Ataide – complete diversity of citizenship/fraudulent joinder;
- Donna Hoyt – complete diversity of citizenship/fraudulent joinder;
- Richard and Barbara Jones – complete diversity of citizenship/fraudulent joinder;
- Dominic Mammola – complete diversity of citizenship/fraudulent joinder;
- Arthur Martinez – complete diversity of citizenship/fraudulent joinder;
- Arthur Presser – complete diversity of citizenship/fraudulent joinder;
- Abel Valli, Jr. and Marie Valli – complete diversity of citizenship/fraudulent joinder;
- Shirley Williams – complete diversity of citizenship/fraudulent joinder;
- James and Edith Winchester – complete diversity of citizenship/fraudulent joinder;
- James Brace (no PFS) – no objection to remand, with reservation of rights;

- 1 • Sue Briggs and Randolph Martin (no PFS) – no objection to remand, with reservation
- 2 of rights;
- 3 • Jaime Donato (no PFS) – no objection to remand, with reservation of rights;
- 4 • Jeffrey Thurlow (no PFS) – no objection to remand, with reservation of rights;
- 5 • Tracy Aubuchon and Tim Gross – no objection to remand, with reservation of rights;
- 6 • William Delaney – no objection to remand, with reservation of rights;
- 7 • Linton Dise – no objection to remand, with reservation of rights;
- 8 • Cynthia Gannon – no objection to remand, with reservation of rights;
- 9 • Douglas Knapp and Nellie Dan – no objection to remand, with reservation of rights;
- 10 • Roberta Lilla – no objection to remand, with reservation of rights;
- 11 • Edward Magennis – no objection to remand, with reservation of rights;²
- 12 • Roberto and Maria Martell – no objection to remand, with reservation of rights;
- 13 • Gary Merin – no objection to remand, with reservation of rights;
- 14 • Jeffrey and Juliana Nielsen – no objection to remand, with reservation of rights;
- 15 • Willie San Nicolas – no objection to remand, with reservation of rights;
- 16 • Sunny Siguenza – no objection to remand, with reservation of rights;
- 17 • William Tinkey and Doreen Frost – no objection to remand, with reservation of rights
- 18 • Carey Watson – no objection to remand, with reservation of rights.

19 **II. Procedural Requirements For Removal Are Satisfied.**

20 40. The Superior Court of the State of California for Alameda County is located within
 21 the Northern District of California. Therefore, removal to this Court satisfies the venue
 22 requirements of 28 U.S.C. § 1446(a).

23 41. This Notice of Removal is timely, in accordance with 28 U.S.C. § 1446(b)(3). The
 24 “case stated by the initial pleading [was] not removable,” *id.*, because the Complaint had bare-
 25 bones allegations about plaintiffs that provided no information about whether they used

26 _____
 27 ² According to a death certificate submitted with Edward Magennis’ Plaintiff’s Fact Sheet, Mr.
 28 Magennis died in 2004. The Complaint was filed long after his death in Mr. Magennis’ name –
 not by a plaintiff suing on his behalf – so Monsanto reserves the right to seek dismissal of Mr.
 Magennis’ claims.

1 Roundup®-branded herbicides for personal reasons or work-related reasons. This precluded
 2 Monsanto from determining whether plaintiffs fraudulently joined Wilbur-Ellis Company.

3 42. It could “first be ascertained that [the State Court Action] . . . bec[a]me
 4 removable,” *id.*, when the State Court Action was added to JCCP No. 4953 by Judge Smith’s
 5 February 7, 2019 Order, which made the State Court Action subject to the JCCP Severance
 6 Order. Monsanto is filing this Notice of Removal within 30 days of February 7, 2019 (not
 7 counting the weekend days at the end of that period), so this Notice of Removal is timely. *See*
 8 § 1446(b)(3); *see also* Fed. R. Civ. P. 6(a)(1).

9 43. For the claims of those plaintiffs who fraudulently joined Wilbur-Ellis Company
 10 and Wilbur-Ellis Feed, those two defendants’ consent to removal is not required because those
 11 defendants have not been “properly joined,” 28 U.S.C. § 1446(b)(2)(A). In any event, to the
 12 extent that their consent may be required, Wilbur-Ellis Company and Wilbur-Ellis Feed have
 13 consented to removal. Hushbeck Declaration ¶ 10; Arkoosh Declaration ¶ 8.³

14 44. The written notice required by 28 U.S.C. § 1446(d) will be promptly filed in the
 15 Superior Court of the State of California for Alameda County and will be promptly served on
 16 plaintiffs.

17 CONCLUSION

18 For the foregoing reasons, Monsanto removes this lawsuit to this Court pursuant to 28
 19 U.S.C. §§ 1332, 1441, and 1446.

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 21
 22
 23
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 26
 27
 28 ³ By requesting and/or providing this consent, no defendant concedes that either Wilbur-Ellis
 Company or Wilbur-Ellis Feed is properly joined as a defendant in this lawsuit.

1 DATED: March 11, 2019

Respectfully submitted,

2 /s/ S. Zachary Fayne

3 S. Zachary Fayne (CA Bar No. 307288)

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